



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 11, 1998

Jerry Haney, Treasurer
Five Civilized Tribes Political Action Committee
P.O. Box 948
Tahlequah, OK 74465

RE: MUR 4867

Dear Mr. Haney:

On December 1, 1998, the Federal Election Commission ("Commission") found that there is reason to believe the Five Civilized Tribes Political Action Committee and you, as *treasurer*, violated 2 U.S.C. §§ 441a(a)(1)(A) and 441a(f), provisions of the Federal Election Campaign Act of 1971, as amended ("Act"). The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

In order to expedite the resolution of this matter, the Commission has also decided to offer to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a *finding of probable cause to believe*. Enclosed is a conciliation agreement that the Commission has approved.

If you are interested in expediting the resolution of this matter by pursuing preprobable cause conciliation and if you agree with the provisions of the enclosed agreement, please sign and return the agreement, along with the civil penalty, to the Commission. In light of the fact that conciliation negotiations, prior to a finding of probable cause to believe, are limited to a maximum of 30 days, you should respond to this notification as soon as possible.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such

Jerry Haney, Treasurer
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counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Thomas J. Andersen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas
Acting Chairman

Enclosures

Factual and Legal Analysis
Procedures
Designation of Counsel Form
Conciliation Agreement

99-044391-4995

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MUR 4867

RESPONDENTS: Five Civilized Tribes Political Action Committee
and Jerry Haney, as treasurer

I. GENERATION OF MATTER

This matter was generated based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its supervisory responsibilities. *See* 2 U.S.C. § 437g(a)(2).

II. FACTUAL AND LEGAL ANALYSIS

A. Applicable Law

The Federal Election Campaign Act of 1971, as amended ("Act," "FECA"), provides that no person shall make contributions to any candidate and his or her authorized political committees with respect to any election for Federal office which in the aggregate exceed \$1,000. 2 U.S.C. § 441a(a)(1)(A). The term "person" includes not only an individual, but also a "committee, association . . . or any other group of persons . . ." 2 U.S.C. § 431(11). The Act further provides that no person shall make contributions to any other political committee (excluding party committees) in any calendar year which in the aggregate exceed \$5,000. 2 U.S.C. § 441a(a)(1)(C). A political committee that has achieved multicandidate status in accordance with 2 U.S.C. § 441a(a)(4) may contribute up to \$5,000 to a candidate and his or her authorized political committees per election. 2 U.S.C. § 441a(a)(2)(A). *See also* 11 C.F.R. § 100.5(e)(3). No candidate or political committee shall knowingly accept any contribution in violation of the provisions of Section 441a. 2 U.S.C. § 441a(f).

The Act does not expressly mention Indian tribes. However, the Commission has determined in past advisory opinions and enforcement matters that unincorporated tribal entities can be considered "persons" under the Act and thus subject to the various contribution prohibitions and limitations. *See* AOs 1993-12 and 1978-51; MURs 2465 and 2302.

B. Factual Background

The term "Five Civilized Tribes" refers to a loose organization of five Native American tribal nations – Cherokee, Choctaw, Chickasaw, Creek and Seminole – whose populations are primarily located in eastern and southern Oklahoma. In 1996, the tribes, or members of them, apparently formed a political action committee, the Five Civilized Tribes Political Action Committee ("Five Committee," "Committee"). On August 13, 1996, the Commission received the Five Committee's Statement of Organization.

In its 1996 30 Day Post-General Report, the Five Committee disclosed contributions totaling \$25,000 received from the Tribal Alliance for Sovereignty ("Tribal Alliance," "Alliance"), an unregistered organization which respondents describe as an informal association of tribal leaders of the Five Civilized Tribes. These contributions were reported as made as follows:

<u>AMOUNT</u>	<u>DATE</u>
\$15,000	March 22, 1996
\$5,000	October 31, 1996
\$5,000	November 1, 1996

The Five Committee's Post-General Report also disclosed contributions to two Federal candidates during the 1996 congressional election campaigns in Oklahoma as follows:

<u>CANDIDATE</u>	<u>AMOUNT</u>	<u>DATE</u>
Darryl F. Roberts (3d CD)	\$5,000	August 22, 1996
Glen D. Johnson (2d CD)	\$5,000	October 2, 1996

On May 28, 1997, a Request for Additional Information ("RFAI") was sent to the Five Committee for the 1996 30 Day Post-General Report. The RFAI noted that the contributions were from an unregistered organization and informed the Committee that the Act precluded it from receiving contributions from a person or another committee in excess of \$5,000 per year. The RFAI advised the Five Committee to either refund to the donor (*i.e.*, Tribal Alliance) or transfer out to a non-Federal account the amount in excess of \$5,000 (*i.e.*, \$20,000). The RFAI also informed the Five Committee that a political committee that has not achieved multicandidate committee status is limited to a \$1,000 contribution per candidate per election. The RFAI recommended that the Committee request a refund and/or redesignate the excessive portion of the contributions.

After sending a Second Notice to the Five Committee and contacting it by phone, the Reports Analysis Division ("RAD") received responses from an Oklahoma law firm, apparently submitted on behalf of the Committee. The first response, dated July 29, 1997, addresses the \$25,000 in contributions made by the Tribal Alliance to the Five Committee in 1996. The response argues that Congress has not explicitly declared that American Indian tribes are covered by the Act, and thus contributions made by the Tribal Alliance cannot be regulated as it is "made up solely of American Indian tribes." The response states that the Five Committee registered with the Commission as a political committee in an effort to cooperate, but that "it is not believed that it would be necessary for any American Indian tribe to form a political action

committee and thereby register with the Commission regarding contributions made to other political action committees or to candidates for political office.”

A second response, dated July 30, 1997, addresses the contributions made by the Five Committee to Federal candidates in amounts exceeding \$1,000. The response concludes that, “[w]hile no attempt has been made to qualify this committee for multi-candidate status, it is not believed that there were any federal contributions in excess of limitations.” The most recent report filed by the Five Committee, the 1998 Mid-Year Report, discloses no activity through March 31, with no cash on hand and no debts.

C. Analysis

1. Tribal Sovereignty and the FECA

No federal court has ever ruled on the applicability of the Act to Indian tribes or their members.¹ However, the Supreme Court and lower courts have generally taken a narrow view of tribal sovereignty such that it would not appear to prevent the Commission from asserting jurisdiction over respondents.

The Supreme Court has repeatedly affirmed the “plenary power” – full and complete power – of Congress over Indian affairs, which includes the power to modify or eliminate tribal rights. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789, 798 (Jan. 26, 1998);

¹ The Commission has previously addressed this issue in MURs 2465 and 2302. In MUR 2465, tribal sovereignty was raised as a defense in a subpoena enforcement action involving the Seminole Tribe of Florida, but the court never ruled on this issue.

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). While the Court has acknowledged the existence of tribal sovereignty, it has emphasized its limited nature. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978), the Court noted that Indian tribes retained elements of “quasi-sovereign” authority after ceding their lands to the United States and announcing their dependence on the Federal government. However, “the tribes’ retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments.” *Id.* The Court explained that “Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers ‘inconsistent with their status,’ Upon incorporation into territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty” (citation omitted). *Id.* at 208-09.

Where Congress explicitly indicates that tribes are subject to a Federal law or that treaty rights are terminated, no tribal sovereignty exists to bar application or enforcement of any such legislation. See *United States v. Dion*, 476 U.S. 734, 738-40 (1986); *Washington v. Fishing Vessel Ass’n*, 443 U.S. 658, 690 (1979); *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968). The Supreme Court has also addressed the question of tribal sovereignty in situations where a federal statute is silent as to Indian tribes, as in the FECA. In *Federal Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960), the Court stated in dictum that “it is now well settled that a general statute in terms applying to all persons includes Indians and their property interests The intent to exclude must be definitely expressed.” See also *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 787 fn. 30 (1984) (“it is highly

questionable whether [Indian tribes] have inherent authority to prevent a federal agency from carrying out its statutory responsibility since such authority would seem to be inconsistent with their [dependent] status"). Therefore, contrary to respondents' view of the implications of statutory silence, the determining factor for the Supreme Court apparently lies not in whether a general Federal statute expressly covers Indian tribes, but in whether it clearly excludes them.

Lower courts have generally recognized three exceptions to the *Tuscarora* rule:

A Federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if (1) the law touches on "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations"

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting *U.S. v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980), *cert. denied* 449 U.S. 1111 (1981)). In *Coeur d'Alene*, the Occupational Safety and Health Act ("OSHA"), a statute of general applicability without reference to Indians or Indian tribes, was held to apply to commercial activities on a tribal farm run by the Coeur d'Alene tribe. The farm employed some non-Indian workers and was similar in its operation and activities to other farms in the area. The *Coeur d'Alene* court concluded that the operation of a farm selling produce on the open market and in interstate commerce is not an aspect of tribal self-government. 751 F.2d at 1116-17. The court further explained that the other exemptions also did not apply because there was no treaty between the Couer d'Alene tribe and the United States, and the legislative history of the OSHA did not indicate any congressional desire to exclude tribal enterprises from the scope of its coverage. *Id.* at 1117-18. In *Farris*, the Ninth Circuit found that the portion of the Organized Crime Control

Act of 1970 that involved syndicated gambling applied to Indian defendants indicted for operating gambling casinos on a reservation. Although the statute was silent as to Indians or Indian tribes, the court stated that "federal laws generally applicable throughout the United States apply with equal force to Indians on a reservation." 624 F.2d at 893.

Other statutes of general application found to overcome tribal sovereignty include the Employment Retirement Income Security Act ("ERISA") (*Smart v. State Farm Insurance Co.*, 868 F.2d 929 (7th Cir. 1989)) and the National Labor Relations Act ("NLRA") (*Navajo Tribe v. National Labor Relations Board*, 288 F.2d 162 (D.C. Cir.), *cert. denied* 366 U.S. 928 (1961)). The *Navajo Tribe* court held that the NLRA applies to employers located on reservation lands, despite the existence of a 19th century treaty granting the Navajo tribe broad powers of self-government, including the right to exclude outsiders. The court cited *Tuscarora* and noted that the NLRA "is a general statute. Its jurisdictional provisions and its definitions of 'employer,' 'employee,' and 'commerce' are of broad and comprehensive scope." *Id.* at 165, fn. 4. The court reasoned that the adoption of a national labor policy by Congress superseded any such local policies of the tribe. *Id.* at 164.

None of the three *Farris* exemptions listed above would appear to prevent the Commission from asserting jurisdiction over respondents. First, the Act would not appear to infringe upon any "intramural matter" of the Five Civilized Tribes because involvement in Federal elections is an aspect of the Tribes' external relations, in contrast to such internal matters as "tribal membership, inheritance rules and domestic relations." *See Couer d'Alene* at 1116. With regard to the second exemption, the 19th century treaties signed by the U.S. Government and each of the Five Civilized Tribes do not appear to contain any provisions even remotely

touching on tribal involvement in the Federal election process.² Therefore, the enforcement of the Act would not appear to infringe upon any treaty right granted to respondents. Finally, concerning the third exemption, the legislative history of the FECA and its amendments contains no evidence of a desire on the part of Congress to exclude Indians or Indian tribes from its coverage.³ See MURs 2465 and 2302.

The lands of the Five Civilized Tribes fall mainly within the boundaries of the Tenth Circuit. Although the majority of circuit courts have read the right to self-governance and other treaty rights narrowly, the Tenth Circuit has taken a rather expansive view of the *Farris* exemptions. In fact, the Tenth Circuit has rendered decisions which appear to be in direct conflict with previously cited cases. For example, the court in *Donovan v. Navajo Forest Products Indus.*, 692 F.2d 709 (10th Cir. 1982), in contrast to the Ninth Circuit's decision in *Couer d'Alene*, ruled that the OSHA did *not* apply to a tribal business enterprise operating on the reservation, even though, as in *Couer d'Alene*, the business enterprise employed some non-Indians and engaged in interstate commerce. The Secretary of Labor's compliance officers had visited the enterprise's facilities and issued various citations charging workplace violations under the OSHA. The court barred the OSHA's jurisdiction over the tribe in light of a treaty provision recognizing the tribe's right to bar non-tribal members from the reservation, and also because

² Between 1785 and 1868, the Cherokee, Choctaw, Chickasaw, Creek and Seminole tribes signed numerous treaties with the Federal government (usually as separate tribes), the texts of which can be found in Volume II of Charles J. Kappler's *Indian Affairs: Law and Treaties* (1904). In general, these treaties delineate the boundaries of each tribe's reservation, provide compensation for lost land and deal with the obligation of the tribes to the federal government in such matters as surrendering fugitives and applying temperance and trading laws.

³ In the 1979 Amendments to the FECA, Congress added the current language to the definition of "person" at 2 U.S.C. § 431(11) that explicitly excludes the "Federal Government or any authority of the Federal Government." The only discussion in the legislative history of this particular amendment simply reiterates the exclusion of the Federal government with no further explanation. House Report No. 96-422, 96th Cong., 1st Sess. 11 (1979). There is no indication in the legislative history of the statute that Congress intended this exemption to extend to other levels of government or to any other entities.

enforcement of the statute's provisions would "dilute the principles of tribal sovereignty and self-government recognized in the treaty." *Navajo Forest*, 692 F.2d at 712.

The Tenth Circuit, in distinguishing *Navajo Forest* from the *Tuscarora* dictum that Indian tribes are covered by statutes of general application unless expressly exempted, noted that *Tuscarora* did not involve an Indian treaty.⁴ The court stated that the "*Tuscarora* rule does not apply to Indians if the application of the general statute would be in derogation of the Indians' treaty rights." *Id.* at 711. The court then endorsed the Supreme Court's observation in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982), that an Indian tribe's power to exclude non-Indians from tribal lands "is an inherent attribute of tribal sovereignty, essential to a tribe's exercise of self-government and territorial management."⁵ *Navajo Forest*, 692 F.2d at 712. The court also favorably noted a footnote in *Merrion* quoting a revision of an authoritative treatise on Indian law, Felix Cohen's *Handbook of Federal Indian Law* (1982): "[O]ver all the land of the [tribal] reservation . . . the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws" *Navajo Forest*, 692 F.2d at 709 (quoting *Merrion*, 455 U.S. at 146, fn. 12). Although the court did not cite any of the *Farris* exemptions, its reliance on *Merrion* – which did not involve a treaty –

⁴ The Supreme Court in *Tuscarora* determined that the Federal Power Commission was entitled to take Indian lands with just compensation because "the lands in question [were] not subject to any treaty between the United States and the Tuscaroras." 362 U.S. at 123.

⁵ *Merrion* concerned an Indian tribe's authority to tax non-Indians who conducted business on the tribe's reservation. The Court ruled that the tribe had the inherent power to impose a severance tax on oil and gas production on the lands of the reservation.

suggests that it would have barred enforcement of the OSHA based solely on the “inherent attribute[s]” of sovereignty necessary for tribal self-government.⁶ 692 F.2d at 712.

Even when read broadly, however, the doctrine of tribal sovereignty enunciated by the Tenth Circuit in *Navajo Forest* would appear to be limited to issues affecting internal tribal autonomy. Because it deals only with an Indian tribe’s relations to the larger society, the FECA in no way impinges upon the Five Civilized Tribes’ ability to set “conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business.” 692 F.2d at 709. In contrast, the Secretary of Labor, in urging application of the OSHA to the Navajo tribe, was attempting to regulate workplace conditions at a tribal enterprise, which, *inter alia*, necessitated the entry of OSHA inspectors on the reservation to verify compliance. The Commission’s jurisdiction over respondents in this matter would not involve any such interference in the Five Civilized Tribes’ internal matters. Further, as previously stated, none of the treaties between the Tribes and the Federal government deal with tribal activities related to Federal elections. Accordingly, there are no treaty rights or inherent sovereign powers of the Tribes that could

⁶ In a footnote, the Ninth Circuit in *Couder d’Alene* expressed its confusion as to the breadth of the court’s tribal sovereignty doctrine in *Navajo Forest*: “To the extent that the Tenth Circuit’s decision is not tied to the existence of an express treaty right, we disagree with it.” 751 F.2d at 1117, fn. 3.

possibly be affected by the regulation of their involvement in the Federal election process.⁷

In the single case cited by respondents, *Equal Employment Opportunity Commission* ("EEOC") v. *Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989), the Tenth Circuit ruled that the EEOC had no jurisdiction over Cherokee tribal employers because the application of the Age Discrimination in Employment Act ("ADEA") would infringe on the treaty rights of tribal self-governance.⁸ In a footnote, the court included the pertinent treaty language:

The United States hereby covenant and agree . . . [to] secure to the Cherokee Nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them

Id. at 938, fn. 3 (quoting from the Treaty of New Echota, December 29, 1835, 7 Stat. 478). The court stated that "in cases where ambiguity exists (such as that posed by the ADEA's silence with respect to Indians), and there is no clear indication of congressional intent to abrogate

⁷ In a recent case involving internal tribal elections on a Chippewa reservation, the Eighth Circuit held that tribal council officials' conspiracy to commit voter fraud in connection with council elections encompassed a violation of the Indian Civil Rights Act ("ICRA"). *United States v. Wadena*, 152 F.3d 831 (8th Cir. Aug. 11, 1998), *reh'g en banc denied* (Aug. 27, 1998). The court noted that the ICRA was passed for the purpose of securing for American Indians the "broad constitutional rights afforded to other Americans," including the right to be free from fraud in a tribal election. *Id.* at 843-45. Although *Wadena* did not involve a Federal election, the court's rejection of defenses based on tribal sovereignty is instructive:

No . . . treaty right -- to be free to conduct fraudulent elections against their people -- is asserted here by the defendants. Contrary to [the defendants'] argument, we find there is no reason why federal criminal jurisdiction over election fraud would work to undermine the sovereignty of the [Chippewa] tribe or its political integrity. . . . [N]o tribal custom or tradition is being threatened by the enforcement of criminal conspiracy laws. There is no tribal custom or tradition of the [tribe] of fraudulently using the election system to maintain positions of power for a few corrupt individuals.

Id. at 846.

⁸ The litigation in *Cherokee Nation* was precipitated by the EEOC's attempt to judicially enforce an administrative subpoena directing the tribe to produce documents concerning several former tribal employees. The subpoena was issued as part of an EEOC investigation of an age discrimination charge filed by a complainant against the tribe's Director of Health and Human Services. 871 F.2d at 937-38.

Indian sovereignty rights (as manifested, *e.g.*, by the legislative history, or the existence of a comprehensive statutory plan), the court is to apply the special canons of [statutory] construction to the benefit of Indian interests.” *Cherokee Nation*, 871 F.2d at 939.

As in *Navajo Forest*, the Tenth Circuit’s view of statutory silence in *Cherokee Nation* cuts against the *Tuscarora* rule favoring express exclusions of Indian tribes in statutes of general application. The court was apparently unwilling to extend the reach of the term “employer” in the ADEA to cover tribal employers, in contrast with the *Navajo Tribe* court’s broader reading of the same term in the NLRA. However, the FECA is distinguishable from both the ADEA and the NLRA in that it does not regulate conduct with a close nexus to internal tribal affairs, such as general business activities of tribal employers on Indian reservations, and thus would not infringe upon the treaty-granted right to “govern[] and protect[] . . . persons and property within the tribe’s own country” *Cherokee Nation*, 871 F.2d at 938, *fn.* 3.

Accordingly, because enforcement of the Act would not directly interfere with any aspect of the Five Civilized Tribes’ rights of self-government, the Tenth Circuit presumably would not challenge the Commission’s authority to assert jurisdiction over them or their members.

2. Contributions to the Five Committee from the Tribal Alliance

The Tribal Alliance for Sovereignty is a “person” within the meaning of 2 U.S.C. § 431(11). *See also* AOs 1993-12 and 1978-51; MURs 2465 and 2302. Accordingly, the Alliance could not contribute more than \$5,000 to any political committee in any calendar year. *See* 2 U.S.C. § 441a(a)(1)(C). The Alliance exceeded this limit by \$20,000 when it contributed a total of \$25,000 to the Five Committee in 1996. The Five Committee appears to have knowingly accepted these excessive contributions. Therefore, there is reason to believe that the Five

Civilized Tribes Political Action Committee and Jerry Haney, as treasurer, violated 2 U.S.C. § 441a(f).

3. Contributions to Federal Candidates from the Five Committee

The Five Committee has not achieved multicandidate status in accordance with 2 U.S.C. § 441a(a)(4), since disclosure reports filed with the Commission indicate that it has not received contributions from more than 50 persons, and it has not made contributions to five or more candidates to Federal office.⁹ As a non-qualified political committee, the Five Committee was limited to a maximum aggregate contribution of \$1,000 to any federal candidate for any single election. *See* 2 U.S.C. § 441a(a)(1)(A). The Five Committee exceeded this limit by \$4,000 when it made a \$5,000 contribution to the campaign of Darryl Roberts on August 22, 1996. It made an excessive contribution in the same amount when it gave \$5,000 to the campaign of Glen Johnson on October 2, 1996. Therefore, there is reason to believe that the Five Civilized Tribes Political Action Committee and Jerry Haney, as treasurer, violated 2 U.S.C. § 441a(a)(1)(A).

⁹ Further, the Five Committee had not been registered with the Commission for six months when the contributions at issue were made. *See* 11 C.F.R. § 100.5(e)(3).